* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 8, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 30, 2004

Case No.: TIA-0130

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act provides for two programs for workers.

The Department of Labor (DOL) administers the first program, which provides $150,000 and medical benefits to certain workers with specified illnesses. Eligible workers include DOE employees and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 7384l. In general, a worker in that group is eligible for an award if the worker was a member of the Special Exposure Cohort or if it is determined that the worker sustained the cancer in the performance of duty. *Id*. Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed prior to February 1, 1992, at a gaseous diffusion plant in Oak Ridge, Tennessee; Paducah, Kentucky; or Portsmouth, Ohio.

The DOE administers the second program. The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation

benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.[1]

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

B. Procedural Background

The Applicant was employed as a staff auditor at DOE's Oak Ridge site. The Worker has worked at the site for 20 years, from 1984 to the present.

The Applicant filed an application with OWA, requesting physician panel review of one illness – ovarian cancer. The Physician Panel rendered a negative determination on the claimed illness and explained the basis of its determination. The OWA accepted the Physician Panel's negative determination on the claimed illness.

The Applicant appeals the Panel's negative determination. The Panel agreed that the Applicant had ovarian cancer, but the Panel determined that there was no evidence establishing a relationship between any exposures at the Applicant's workplace and the illness.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure

[1] ***See*** **www.eh.doe.gov/advocacy.**

during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,[2] applied the wrong standard,[3] or failed to explain the basis of its determination.[4] On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In her appeal, the Applicant maintains that the negative determination is incorrect. First, the Applicant states that, although the Panel indicated in its report that she was a Y-12 employee, she worked for several years at the K-25 site. Second, she notes that the DOL designated her as a member of the Special Exposure Cohort. The Applicant states that although her employment was administrative in nature, her duties as an internal auditor required access to various sites and facilities, including K-25 and the Paducah and Portsmouth sites, and it is possible that she came in contact with hazardous materials. Lastly, the Applicant notes that there is no history of cancer of any type in her family. As explained below, the Applicant's arguments do not provide a basis for granting the appeal.

First, the Panel's failure to mention the Applicant's K-25 employment does not indicate panel error. The Panel considered the entire period of the Applicant's employment, from 1984 to the present. The record, reviewed by the Panel, indicated that the Applicant worked at K-25 and several other plants during the course of her employment. Record at 9, 19, 20, 145, 151, and 157. Accordingly, the Panel's statement that the Applicant was a Y-12 employee does not indicate a failure to consider her K-25 employment..

Second, the fact that the Applicant was designated a member of the Special Exposure Cohort under the DOL program does not represent a finding that the Applicant was exposed to toxic substances in the course of her employment or that any such exposure contributed to her illness. Under the Physician Panel Rule, the Panel can render a positive determination only if the Panel determines that "it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue." 10 C.F.R. § 852.8. Thus, the causation standards of the DOL program and the DOE program differ.

---

[2] ***Worker Appeal,*** **Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).**

[3] ***Worker Appeal,*** **Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).**

[4] ***Id.***

The preamble to the DOE Physician Panel Rule discusses this difference:

> **Under the DOL program, a member of a Special Exposure Cohort...who has a specified cancer could establish entitlement to benefits for a specified cancer without showing that the disease is the result of exposure to a toxic substance because the statute dispenses with that requirement for Special Exposure Cohort members in the DOL program. A Physician Panel, however, can make a positive determination only if sufficient evidence is provided to meet the standard as specified in section 852.8.**

67 Fed. Reg. 52,849. Thus, being designated a member of the Special Exposure Cohort, and subsequently receiving a DOL award, does not represent a DOL conclusion that the Applicant meets the causation standard of the Physician Panel Rule. Despite the Applicant's arguments that it is possible that she was exposed to hazardous substances, there is no evidence in the record that she was exposed to any such substances.

Lastly, the Applicant's statement that there is no history of cancer of any type in her family does not provide a basis for finding panel error. The absence of a family history of an illness does not mean that the illness is related to DOE employment.

As indicated above, the Applicant's arguments are merely disagreements with the Panel's medical judgment, rather than indications of Panel error. Accordingly, the appeal does not provide a basis for finding panel error and, therefore, should be denied.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy Case No. TIA-0130 be, and hereby is, denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 8, 2004